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Nos. 80-1208, 80-1471 and 80-1610.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

NEW ENGLAND POWER COMPANY,
APPELLANT,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE LEGISLATIVE UTILITY CONSUMERS' COUNCIL,
APPELLEE.

DENNIS J. ROBERTS II, ET AL.,
APPELLANTS,
v.
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION, ET AL.,
APPELLEES.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

Brief of Appellant New England Power Company.

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Appeal docketed January 19, 1981 in No. 80-1208, February 27, 1981 in No. 80-1471, and March 23, 1981, in No. 80-1610.
Probable Jurisdiction noted May 18, 1981.

Questions Presented

Invoking for the first time a 1913 state statute, the New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling outside the state any energy generated by NEP's federally-licensed hydroelectric projects in New Hampshire. The energy is currently delivered to an interstate transmission network and sold in three New England states including New Hampshire. These appeals are from a judgment of the New Hampshire Supreme Court upholding the state statute as applied by the PUC. The questions presented are:

1. (a) Whether the New Hampshire statute, under which the PUC has attempted to secure the economic benefits of hydroelectric energy generated within the state exclusively for the citizens of that state, unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

(b) Whether Congress, in providing in Section 201(b) of Part II of the Federal Power Act that nothing in Part II "shall deprive" any state of "lawful authority now exercised" over hydroelectric energy exports, affirmatively granted New Hampshire the power to restrict such exports.

2. Whether Part I of the Federal Power Act, vesting comprehensive licensing authority in the Federal Energy Regulatory Commission ("FERC") over NEP's hydroelectric projects, preempts the state statute.

3. Whether Part II of the Federal Power Act, vesting exclusive jurisdiction in FERC over wholesale sales of electricity in interstate commerce, preempts the state statute as applied by the PUC to require NEP to modify its existing wholesale tariffs and contracts on file with FERC to effect a transfer of the economic benefits of the hydroelectric energy to New Hampshire citizens.

Parties to the Proceeding Below

The following parties appeared before the New Hampshire Supreme Court: New England Power Company; Commonwealth of Massachusetts; Dennis J. Roberts II, Attorney General of Rhode Island; Edward M. Burke, Administrator of the Rhode Island Division of Public Utilities and Carriers; the State of New Hampshire; and the New Hampshire Legislative Utility Consumers' Council.

Appellant New England Power Company is a wholly-owned subsidiary of New England Electric System, a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 to 79z-6 (1976). Appellant is a parent of Connecticut Yankee Atomic Power Company, Maine Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation and Yankee Atomic Electric Company, and an affiliate of Granite State Electric Company, Massachusetts Electric Company, The Narragansett Electric Company, New England Energy Incorporated, and New England Power Service Company.

Table of Contents.

Questions presented	i
Parties to the proceeding below	ii
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement of the case	4
A. Facts	4
B. Proceedings before the PUC	7
C. The decision below	8
Summary of argument	9
Argument	14
I. New Hampshire's hydroelectric export statute violates the Commerce Clause	14
A. State action that unduly burdens interstate commerce violates the Commerce Clause	15
B. New Hampshire's hydroelectric export statute violates the Commerce Clause	17
C. In enacting the hydroelectric export clause of Section 201(b) of the Federal Power Act, Congress did not affirmatively authorize New Hampshire to capture the economic benefits of NEP's hydroelectric generation	19
1. An affirmative grant of authority is required to authorize state action otherwise prohibited by the Commerce Clause	20
2. The language, legislative history and context of the Section 201(b) hydroelectic export clause establish that the clause does not affirmatively grant New Hampshire any authority to regulate interstate commerce	22

II. The New Hampshire statute is preempted by Part I of the Federal Power Act 29

A. A state statute is void under the Supremacy Clause to the extent it frustrates the basic objectives of a federal regulatory scheme 30

B. The central purpose of Part I is to benefit interstate commerce to the fullest extent possible through the development and use of hydroelectric power 31

C. The New Hampshire statute frustrates the central purpose of Part I 34

D. The hydroelectric export clause of Section 201 (b) of Part II does not save the New Hampshire statute from Part I preemption 36

III. The New Hampshire statute as applied by the PUC is preempted by Part II of the Federal Power Act 38

A. In enacting Part II of the Federal Power Act, Congress gave FERC pervasive and exclusive regulatory authority over interstate wholesale sales of electricity 39

B. The PUC's order applying the New Hampshire statutes invades FERC's exclusive domain over interstate wholesale rates 42

C. The Section 201(b) hydroelectric export clause does not protect the PUC's application of the New Hampshire statute from Part II preemption 45

Conclusion 48

Appendix follows page 48

CASES.

A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976) 28n

Arkansas Louisiana Gas Co. v. Hall, 49 U.S.L.W. 4947 (July 2, 1981) 41

Bellows Falls Hydro-Electric Corp., 2 F.P.C. 380 (1941) 34, 37

City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) 30

Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) 20, 29

Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950) 28n

Commonwealth Edison Co. v. Montana, 49 U.S.L.W. 4957 (July 2, 1981) 18n

Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515 (1945) 39

Farmington River Power Co. v. Federal Power Commission, 455 F.2d 86 (2d Cir. 1972) 37

Federal Power Commission v. Florida Power & Light Co., 404 U.S. 453 (1972) 13, 40, 43

Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964) 11, 24, 24n, 26n, 29

Federal Power Commission v. Union Electric Co., 381 U.S. 90 (1965) 12, 31, 32, 34, 37

First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946) 12, 21, 33, 34n

Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963) 30

Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) 16

Hartford Electric Light Co. v. Federal Power Commission, 131 F.2d 953 (2d Cir. 1942) 24n

Hicklin v. Orbeck, 437 U.S. 518 (1978) 17

Hines v. Davidowitz, 312 U.S. 52 (1941) 12, 30, 31, 34, 36

Hodel v. Indiana, 49 U.S.L.W. 4667 (June 15, 1981) 27n

Hodges v. Public Service Commission, 110 W. Va. 649, 159 S.E. 834 (1931) 26n

Hughes v. Oklahoma, 441 U.S. 322 (1979) 15, 17

Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682 (1947) 24

James Clark Distilling Co. v. Western Maryland Railway, 242 U.S. 311 (1917) 21

Jersey Central Power & Light Co. v. Federal Power Commission, 319 U.S. 61 (1943) 39

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 10, 15, 16, 20, 21 *et seq.*

Maryland v. Louisiana, 49 U.S.L.W. 4562 (May 26, 1981) 14, 16, 30, 31, 44

Milwaukee v. Illinois, 49 U.S.L.W. 4445 (April 28, 1981) 28n

Minnesota v. Clover Leaf Creamery Co., 49 U.S.L.W. 4111 (Jan. 21, 1981) 28n

Montana-Dakota Utilities Co. v. Northwestern Public Service Commission, 341 U.S. 246 (1951) 41

Municipalities of Groton v. Federal Energy Regulatory Commission, 587 F.2d 1296 (D.C. Cir. 1978) 7

Nevada Power Co., 10 FPS 5-211, *rehearing denied*, 10 FPS 5-568 (1976), *aff'd*, 589 F.2d 1002 (9th Cir. 1979) 44

New England Power Pool Agreement, 10 FPS 5-594 (1976) 7

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 9, 16, 18, 19

Pennsylvania Water & Power Co. v. Federal Power Commission, 343 U.S. 414 (1952) 38

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 9, 10, 16, 17, 18 *et seq.*

Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946) 21

Public Utilities Commission v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) 10, 13, 17, 18, 24 *et seq.*

Puget Sound Power & Light Co. v. Federal Power Commission, 557 F.2d 1311 (9th Cir. 1977) 37

In re Rahrer, 140 U.S. 545 (1891) 21

Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) 30

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 30, 31

Safe Harbor Water Power Corp., 5 F.P.C. 221 (1946) 46

Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604 (1950) 27n

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 27n

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 20, 29n

Union Electric Co., 27 F.P.C. 801 (1962) 32

United States v. Appalachian Electric Power Co. 311 U.S. 377 (1941) 37

United States v. Public Utilities Commission, 345 U.S. 295 (1953) 11, 24, 24n, 25, 26 *et seq.*

West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) 9, 16, 18

Whitfield v. Ohio, 297 U.S. 431 (1936) 21

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution
Commerce Clause, Art. I, § 8, Cl. 3 2, 3, 10, 12, 14 *et seq.*

Supremacy Clause, Art. VI, Cl. 2 2, 3, 11, 12, 30 *et seq.*

FEDERAL PROVISIONS.

Air Quality Act of 1967, Section 209, 42 U.S.C. § 7543 (Supp. I 1977) 27n, 44n

Bank Holding Company Act of 1956, Section 7, 12 U.S.C. § 1846 (1976) 20

Boulder Canyon Project Act, Section 6, 43 U.S.C. § 617e (1976) 26

Federal Power Act

Part I, Sections 1 - 29, 16 U.S.C. §§ 792-823 (1976)

Section 4(e), 16 U.S.C. § 797(e) (1976) 32

Section 9(b), 16 U.S.C. § 802(b) (1976) 33n, 34n

Section 10(a), 16 U.S.C. § 803(a) (1976) 32

Section 19, 16 U.S.C. § 812 (1976) 33n

Section 20, 16 U.S.C. § 813 (1976) 25, 33n

Section 23(b), 16 U.S.C. § 817 (1976) 32n, 36, 37

Section 27, 16 U.S.C. § 821 (1976) 21, 34n

Part II, Sections 201 - 210, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979)

Section 201, 16 U.S.C. § 824 (1976 & Supp. III 1979) 23, 24

Section 201(a), 16 U.S.C. § 824(a) (1976) 11, 24n, 26, 39, 40 *et seq.*

Section 201(b), 16 U.S.C. § 824(b) (Supp. III 1979) *passim*

Section 202, 16 U.S.C. § 824a (1976 & Supp. III 1979) 42

Section 205, 16 U.S.C. § 824d (1976 & Supp. III 1979) 13, 40, 41, 43

Section 205(a), 16 U.S.C. § 824d(a) (1976) 40

Section 205(b), 16 U.S.C. § 824d(b) (1976) 13, 14, 41, 43, 44n
Section 205(c), 16 U.S.C. § 824d(c) (1976) 41
Section 205(d), 16 U.S.C. § 824d(d) (Supp. III 1979) 41
Section 205(e), 16 U.S.C. § 824d(e) (1976) 41
Section 206, 16 U.S.C. § 824e (1976) 13, 40, 41, 43
Section 206(a), 16 U.S.C. § 824e(a) (1976) 41
Section 210, 16 U.S.C. § 824i (Supp. III 1979) 42
Section 211, 16 U.S.C. § 824j (Supp. III 1979) 42
Section 212, 16 U.S.C. § 824k (Supp. III 1979) 42

Federal Water Pollution Control Act, Section 505(e), 33 U.S.C. § 1365(e) (1976) 28n

Hawes-Cooper Act, 49 U.S.C. § 60 (1976) 21

Judicial Code, 28 U.S.C. § 1257(2) (1976) 2

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976) 21

Natural Gas Act
15 U.S.C. §§ 717-717w (1976), as amended by the Natural Gas Policy Act, 44n
15 U.S.C. §§ 3301-3432 & 42 U.S.C. § 7255 (Supp. III 1979) 44n

Public Utility Holding Company Act, 15 U.S.C. §§ 79 to 79z-6 (1976) ii

Public Utility Regulatory Policies Act of 1978, 42
Section 205, 16 U.S.C. § 824a-1 (Supp. III 1979) 42

Webb-Kenyon Act, 27 U.S.C. § 122 (1976) 21

Wilson Act, 27 U.S.C. § 121 (1976) 21

STATE PROVISIONS.

Maine
Me. Rev. Stat. Ann. tit. 60 § 1 (1916), tit. 68 § 1 (1930), repealed 1955 Me. Acts, ch. 402 26n, 38n

New Hampshire
N.H. Rev. Stat. Ann. § 374:35 2, 3, 7

West Virginia
1929 W. Va. Acts, ch. 58 26n

Wisconsin
Wis. Stat. § 31.27 (1931), § 196:375 (1977) 26n

MISCELLANEOUS.

H.R. Rep. No. 61, 66th Cong., 1st Sess. (1920) 31

H.R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) 23

H.R. Rep. No. 728, 90th Cong., 1st Sess. (1967) 27n

79 Cong. Rec. 10527 (1935) 23, 46

Economic Regulatory Administration, U.S. Department of Energy, *Power Pooling: Issues and Approaches* (1980) 5

Maine Legislative Record, House, May 17, 1955 38n

L. Smith, *The Power Policy of Maine* (1951) 38n

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ON APPEALS FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

Opinions Below

The opinion of the New Hampshire Supreme Court (J.S. App. 1a-14a) is reported at ____ N.H. ____, 424 A.2d 807

(1980). The PUC's Report and Order dated August 27, 1980 (J.S. App. 15a-24a) and its Report and Order dated September 19, 1980 (J.S. App. 25a-40a) are unreported.[1]

Jurisdiction

This is an appeal from a final judgment of the New Hampshire Supreme Court upholding a New Hampshire statute as applied by the New Hampshire Public Utilities Commission to ban the export of hydroelectric energy generated within the state. The court rejected claims that the statute as so applied violates the Constitution and laws of the United States. Judgment was deemed to have been entered on December 23, 1980, when the decision of that court was docketed by its clerk. Notices of appeal were filed below on January 12, 1981 (J.S. App. 41a; No. 80-1610 J.S. App. 1a) and January 15, 1981 (No. 80-1471 J.S. App. 3a). The appeals were docketed on January 19, 1981 (No. 80-1208), February 27, 1981 (No. 80-1471) and March 23, 1981 (No. 80-1610). On May 18, 1981, this Court noted probable jurisdiction and consolidated the three cases. The Court has jurisdiction of these appeals under 28 U.S.C. § 1257(2) (1976).

Constitutional and Statutory Provisions Involved

This case raises questions concerning the validity of New Hampshire's hydroelectric export statute, N.H. Rev. Stat. Ann. § 374:35, under the Commerce and Supremacy Clauses of the United States Constitution, art. I, § 8, cl. 3 and art. VI,

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[1] "J.S. App." refers to the appendix to the Jurisdictional Statement in No. 80-1208.

cl. 2, and Parts I and II of the Federal Power Act, 16 U.S.C. §§ 792-824k (1976 & Supp. III 1979).

N.H. Rev. Stat. Ann. § 374:35 provides:

> **Permission Required.** No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business. Any such corporation engaged in the business of transmitting or conveying such electrical energy beyond the confines of this state pursuant to such order shall discontinue such business in whole or in part, to such extent and under such conditions as the commission may order, whenever, after notice to such corporation and hearing thereon, the commission shall find that such electrical energy or the portion thereof affected by said order is reasonably required for use within this state and that the public good requires that it be delivered for such use.

Article I, section 8, clause 3 of the United States Constitution provides:

> The Congress shall have Power
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ..

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant portions of the Federal Power Act are set forth in an Appendix, *infra*, pp. 1a-9a.

Statement of the Case

This case involves an attempt by one state to secure the economic benefits of one of its natural resources exclusively for the advantage of its own citizens. The resource in question — hydroelectric energy — is currently delivered to a highly integrated, regional transmission network serving all of New England. The New Hampshire Public Utilities Commission ("PUC") has prohibited New England Power Company ("NEP") from selling the energy outside of New Hampshire. The immediate result of the order, if allowed to stand, will be higher electric rates for many Rhode Island and Massachusetts consumers and lower rates in New Hampshire.

A. Facts

NEP is a public utility which generates and transmits electricity at wholesale in interstate commerce. Its principal customers are three retail affiliates which resell the electricity at retail to over one million customers in Massachusetts, Rhode Island and New Hampshire. NEP also sells power at wholesale to some 30 non-affiliated utilities, the majority of which are municipal light departments serving cities and towns in Massachusetts. About 420 megawatts, or about ten percent, of

NEP's total generating capacity consists of hydroelectric units located within New Hampshire on the Connecticut River (Joint Appendix ["J.A."] 23a; Record, PUC Exhibit No. 6, Schedule 1). These units are all licensed by the Federal Energy Regulatory Commission, successor to the Federal Power Commission,[2] under Part I of the Federal Power Act (J.A. 11a).

NEP is a member of the New England Power Pool ("NEPOOL"), a highly integrated, regional power pool whose members own over 98 percent of the generation capacity and essentially all of the transmission facilities located in the six-state New England region (J.A. 30a). NEPOOL was organized to meet two specific objectives: to assure that the New England bulk power supply system meets proper standards of reliability, and to achieve the maximum practical economies in the operation of the regional system (J.A. 32a-33a).

NEPOOL members share in economies of scale made possible by coordinated planning and operation. Pool members frequently jointly plan and construct large generating units. Generating units are centrally dispatched on a regional basis. Members share generating reserves. Through access to a strong, interconnected transmission network or "grid," pool members are able to purchase shares in generating units throughout New England (J.A. 34a). NEPOOL is acknowledged as one of the most advanced and comprehensive power pooling arrangements in the United States. Economic Regulatory Administration, U.S. Department of Energy, *Power Pooling: Issues and Approaches* 1.23 (1980).

The key to the achievement of operational economies is centralized economic dispatch. All generating facilities throughout the six-state region are controlled by the NEPOOL dispatch center. The NEPOOL computer calculates the cost of

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[2]Both the Federal Energy Regulatory Commission and the Federal Power Commission will be referred to as "FERC" throughout this Brief.

generating electricity for each generating unit in New England and dispatches each unit to minimize the cost of the region's total electric power supply (J.A. 34a-35a). Hydroelectric generating units are dispatched by first taking into account the amount of water in the various rivers. The units are then scheduled to displace the most expensive generation by fossil-fired plants elsewhere in the region that would otherwise have to be run (J.A. 35a). Centralized dispatch means

> that the units are operated regardless of company ownership or geography and the transmission capability of the Pool allows power to flow in such a way that the total overall costs to the Pool are minimized.

(J.A. 34a-35a.) To distribute these savings, NEPOOL calculates how much it would cost each member utility to meet its own customers' load solely with its own generation. NEPOOL then bills each member that amount, less its share of the savings resulting from central dispatch (J.A. 50a). In 1979, NEPOOL dispatch saved the region over 44 million dollars compared to the costs that would have been incurred if each company had run on its own generation (J.A. 35a).

All of NEP's generating units, including its Connecticut River hydroelectric plants, are connected to the regional transmission network and operated under NEPOOL dispatch (J.A. 35a, 53a). All energy generated at the hydroelectric units flows freely in the transmission network throughout the six-state region. Once the hydroelectric units are dispatched by NEPOOL, it cannot be determined which customers the units physically serve (J.A. 53a). In short, the units are an integral part of a highly sophisticated, regional bulk power supply system operated without regard to state boundaries.

NEP's wholesale sales are comprehensively regulated by FERC under Part II of the Federal Power Act (J.A. 11a). The

costs and benefits of its hydroelectric units, as well as its other units, are allocated to its customers in Massachusetts, Rhode Island, and New Hampshire through rates and contracts on file with and approved by FERC. Because hydroelectric facilities have no fuel costs, NEP's Connecticut River plants produce electricity at a cost well below most other generating stations. These economic benefits are reflected in NEP's wholesale rates and shared by all of NEP's customers in the three-state region. Finally, the dispatch of NEP's units by NEPOOL is governed by an agreement investigated and approved by FERC under Part II (J.A. 12a-13a). *New England Power Pool Agreement*, 10 FPS 5-594 (1976), *aff'd sub nom. Municipalities of Groton v. Federal Energy Regulatory Commission*, 587 F.2d 1296 (D.C. Cir. 1978).

B. Proceedings before the PUC

Since 1913, New Hampshire has had in effect a statutory scheme — now codified in relevant part in N.H. Rev. Stat. Ann. § 374:35 ("the New Hampshire statute") — requiring utilities which operate hydroelectric units in New Hampshire to obtain permission from the PUC to transmit electricity to points outside New Hampshire. Prior to the instant proceeding, the PUC had never withheld such permission.

On November 21, 1979, the PUC instituted its first investigation under the statute to determine whether it should withdraw permission previously granted NEP to export hydroelectric energy generated at NEP's Connecticut River plants. In December 1979, NEP moved to dismiss the proceedings on the ground that the PUC lacked authority under the statute to prohibit the export of hydroelectric energy. NEP challenged the statute, as invoked by the PUC, on three federal grounds: (1) it would place an undue burden on interstate commerce; (2) it is preempted by FERC licensing authority over NEP's

hydroelectric projects under Part I of the Federal Power Act; and (3) it is preempted by FERC's regulation of NEP's wholesale sales under Part II of the Act.

The PUC deferred ruling on NEP's motion to dismiss and conducted hearings on the merits of an export restriction. Finally, on August 27, 1980, the PUC denied NEP's motion and held that the New Hampshire statute validly confers jurisdiction on the PUC to restrict hydroelectric exports (J.S. App. 15a-24a).

On September 19, 1980, the PUC issued its Report and Order on the merits (J.S. App. 25a-40a). The PUC withdrew permission to export hydroelectric energy and directed NEP to make arrangements to sell the energy solely to utilities or consumers within New Hampshire (J.S. App. 40a). The PUC did not, however, order NEP to prevent the energy from physically crossing state lines. Under the PUC's order, this hydroelectric energy will continue to be delivered to the regional transmission network; the economic benefits of the energy, however, will be confined to New Hampshire.

C. The Decision Below

NEP appealed the PUC's August 27 and September 19 orders to the New Hampshire Supreme Court, asserting the same federal constitutional and statutory challenges it had raised before the PUC. The court rejected NEP's federal claims and upheld the New Hampshire statute as applied by the PUC (J.S. App. 1a-14a).

The court concluded that the New Hampshire export statute as applied by the PUC did not run afoul of the Commerce Clause (J.S. App. 6a-8a, 10a-12a). In the court's view, Congress affirmatively granted the state authority to restrict hydroelectric exports by inserting a savings clause in Section 201(b) of Part II of the Federal Power Act, 16 U.S.C. § 824(b) (Supp. III 1979) (J.S. App. 7a-8a, 10a-11a).

The court also found no conflict between the New Hampshire statute as applied by the PUC and the regulatory schemes embodied in Parts I and II of the Federal Power Act. The court reconciled the PUC's order with FERC's exclusive jurisdiction under Part II over wholesale electric rates by characterizing the order as no more than an assertion of "control of the assignment of the power" (J.S. App. 12a). At the same time, however, the court acknowledged that to accomplish this reassignment "new rates, contract modifications, or accounting adjustments . . . may naturally flow from the export termination" (J.S. App. 14a).

The court remanded the case to the PUC for implementation, concluding:

> [NEP] must make appropriate adjustments and filings with the appropriate federal and State administrative agencies to enable New Hampshire to regain the benefit of its hydroelectric power.

Id. The PUC has not acted on remand pending resolution of these appeals by this Court.

Summary of Argument

A.

The Commerce Clause prevents a state from securing the economic benefits of its own resources exclusively for its own citizens. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). A state may not prevent a commodity from being sold in interstate commerce simply because the commodity is needed within the state. Where state restrictions on commerce are motivated by "simple economic protectionism . . ., a virtually per se rule of in-

validity has been erected." *Philadelphia v. New Jersey*, 437 U.S. at 624. The transmission and sale at wholesale of electric energy in interstate commerce is fully subject to the protections of the Commerce Clause. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

NEP's Connecticut River hydroelectric units are connected to the New England transmission network. The units are centrally dispatched by NEPOOL and electric energy from the units flows freely throughout the regional grid. The energy is therefore in interstate commerce. The express purpose of the PUC in issuing its order is to secure the economic benefits of NEP's hydroelectric generation exclusively for citizens of New Hampshire. Unless affirmatively authorized by Congress, the order directly burdens interstate commerce in violation of the Commerce Clause. And, contrary to the decision of the court below, Section 201(b) of the Federal Power Act does not provide such authorization.

The Court has recognized that while Congress can affirmatively grant states authority to regulate interstate commerce, it has done so only rarely, and by using language that is affirmative, prospective and specific. Traditional savings clauses, on the other hand, define the limits of preemption and do not give the states any power over interstate commerce not previously enjoyed. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 48-49 (1980).

Tested against the previous holdings of this Court, the hydroelectric export clause of Section 201(b) is clearly a savings clause defining the scope of preemption by Part II of the Federal Power Act and does not authorize the PUC to regulate and burden commerce.

The plain language of the clause — which states that Part II shall not "deprive" a state of its "lawful authority now exercised" over hydroelectric energy exports — clearly establishes that it confers no authority but is a traditional grandfather

clause simply saving from preemption by Part II whatever restrictions were lawfully imposed prior to the Act's passage. The legislative history of Section 201(b) confirms that Congress intended to preserve whatever state authority predated Part II, not to create any new state authority. Moreover, the clause should be construed consistently with similarly worded clauses contained in Sections 201(a) and (b), 16 U.S.C. §§ 824(a), 824(b) (1976 & Supp. III 1979), that have been construed as savings provisions rather than affirmative grants of power. *E.g.*, *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964); *United States v. Public Utilities Commission of California*, 345 U.S. 295, 311 (1953). Finally, absent a manifest congressional intent to differentiate among states, a construction of the clause as a grant of power to regulate commerce to only the few states that had export restrictions predating the Act should be avoided. A selective delegation of Congress' authority to regulate interstate commerce would be unique. It would, moreover, involve delicate and sensitive issues of federal-state relationships. Therefore, an intent to create distinctions among states regarding the authority to regulate commerce should not be lightly imputed.

Thus, the language, the legislative history, the context of the provision in the statute, and this Court's prior decisions construing cognate provisions, all compel the conclusion that Section 201(b) cannot save New Hampshire's effort at "simple economic protectionism" from a Commerce Clause attack.

B.

The New Hampshire statute as applied by the PUC is preempted by Part I of the Federal Power Act, 16 U.S.C. §§ 792-823 (1976). Under this Court's preemption decisions, state action must fall under the Supremacy Clause if it "stands

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting federal legislation. *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

Part I was enacted to provide for "the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest . . . ." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 98 (1965). The primary purpose of the Act was to develop hydroelectric energy to meet the needs of an expanding national economy. *Id.* at 99. To achieve this purpose, the Act embodies the "full measure of Congress' authority under the Commerce Clause to regulate hydroelectric projects." *Id.* at 107. In administering the licensing provisions of the Act, FERC must consider the impact of a proposed project on the "full spectrum of commerce interests." *Id.* at 101.

In enacting Part I, Congress recognized state authority in limited areas. Congress envisioned regulatory regimes that complemented one another, however, and did not contemplate "a divided authority over any one subject." *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 174 (1946). Since a core concern of Congress was the development of hydroelectric power to benefit interstate commerce, any state regulation inconsistent with that objective must fall under the Supremacy Clause.

NEP's Connecticut River hydroelectric projects are all licensed by FERC under Part I on the assumption that the output of the units will benefit interstate commerce. By preventing any sharing of the economic benefits of this hydroelectric generation with non-New Hampshire customers, the PUC's order defeats the purpose of federal licensure, *i.e.*, that the projects serve national, rather than parochial, interests. Moreover, the PUC's order will also discourage NEP from building additional hydroelectric units in New Hampshire or augmenting the capacity of existing units, thereby preventing full develop-

ment of New Hampshire's hydroelectric potential to benefit interstate commerce. The PUC's application of the New Hampshire statute must therefore yield to superior federal authority under Part I.

The hydroelectric export clause in Section 201(b) does not save the New Hampshire statute from Part I preemption since by its terms it applies only to Part II.

C.

The PUC's action is also preempted by Part II of the Federal Power Act. Part II established, in the wake of the *Attleboro* decision, a comprehensive federal regulatory scheme over the transmission and wholesale sale of electric energy in interstate commerce. FERC's jurisdiction under Part II is pervasive, reaching any utility owning facilities used in the transmission of electric energy in interstate commerce. *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972). Under the Part II ratemaking provisions (Sections 205 and 206, 16 U.S.C. §§ 824d, 824e (1976 & Supp. III 1979)), all rates for wholesale interstate service must be filed with FERC and are subject to FERC's full investigatory and ratemaking powers. Wholesale rates must be just and reasonable, and must not discriminate unduly among customers or "between localities." Section 205(b), 16 U.S.C. § 824d(b) (1976). FERC also has significant powers to encourage power pooling and to order interconnections and the provision of transmission services between utilities.

NEP is fully subject to Part II. NEP operates an integrated, interstate system; all of its wholesale sales are at rates on file with FERC subject to FERC's plenary rate jurisdiction. The New Hampshire order directly interferes with FERC's juris-

diction. To sell the output of its New Hampshire hydroelectric units within New Hampshire, NEP would have to alter substantially its current wholesale rates and contracts on file with FERC. Any new rates filed by NEP would be subject to attack before FERC under Section 205(b) on the ground that they unduly discriminate between localities. The New Hampshire action attempts to reallocate the costs of generation among wholesale customers. It countermands the specific FERC requirement that utilities average the costs of hydroelectric generation with the costs of all other sources of power and spread the average costs evenly among wholesale customers in all states. New Hampshire's attempt therefore is fatally flawed under basic preemption doctrine. *Maryland v. Louisiana*, 49 U.S.L.W. 4562, 4568-69 (May 26, 1981).

The hydroelectric export clause in Section 201(b) does not save the PUC's action since that clause was never intended to "preserve" state authority over wholesale rates. The clause preserves whatever "lawful authority" certain states exercised over the volume of hydroelectric energy exported in 1935. New Hampshire's attempt to reallocate the economic benefits of hydroelectric energy among NEP's wholesale customers — rather than to regulate the physical transmission of that energy — falls completely outside the scope of Section 201(b).

Finally, since the hydroelectric export clause saves from Part II preemption only those lawful export restrictions actually "exercised" in 1935, it does not save from Part II preemption export restrictions imposed for the first time in 1980.

Argument

I. New Hampshire's Hydroelectric Export Statute Violates the Commerce Clause.

This portion of our argument has two distinct but related parts: First, the New Hampshire statute, viewed independently

of the Federal Power Act, unduly burdens interstate commerce in violation of the Commerce Clause. Second, by providing in Section 201(b) of Part II of the Federal Power Act that nothing in Part II "shall deprive" a state of "lawful authority now exercised," Congress did not affirmatively grant New Hampshire authority over such exports.

This Court made an identical two-part inquiry in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), in striking down Florida statutes under the Commerce Clause. In a passage equally applicable here, the Court framed the dual questions as follows:

> The first is whether the statutes, viewed independently of federal legislation regulating the banking industry, burden interstate commerce in a manner contrary to the Commerce Clause. The second is whether Congress, by its own legislation in this area, has created an area in which the States may regulate free from Commerce Clause restraints. . . .

Id. at 35. The Court resolved both questions against the Florida statutes. The New Hampshire statute as applied is equally invalid.

A. *State Action that Unduly Burdens Interstate Commerce Violates the Commerce Clause.*

The Commerce Clause reflects the fundamental conviction of the Framers that "in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979). This Court through the years has been particularly alert to "the evils of 'economic isolation' and protectionism . . . . Thus, where sim-

ple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978). In the absence of congressional consent, the Commerce Clause prevents a state from securing economic advantages for its own citizens by erecting barriers to or placing undue burdens upon interstate commerce. *E.g., Maryland v. Louisiana*, 49 U.S.L.W. 4562 (May 26, 1981); *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44; *Pennsylvania v. West Virginia*, 262 U.S. 553, 596-97 (1923). Moreover, a state may not prevent articles of commerce from being sold in interstate commerce simply because "they are required to satisfy local demands or because they are needed by the people of the state." *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).

The Court has dealt particularly harshly with state attempts to restrict the sharing of their natural resources with other states. In *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911), the Court struck down an Oklahoma statute prohibiting the transportation of natural gas out of the state. Rejecting a state's assertion of a right to reserve "the resources of the State for the use of the inhabitants of the State, present and future," *id.* at 250, the Court declared:

> If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. . . .

Id. at 255.

The Court also overturned a subsequent West Virginia statute strikingly analogous to the New Hampshire statute at issue here. *Pennsylvania v. West Virginia*. The West Virginia statute required natural gas companies producing gas in the state to satisfy the needs of state residents before sending any gas out of state. If allowed to stand, the law would have diverted to local consumers a large amount of gas then flowing

in interstate commerce to other states. The Court held that the statute impermissibly burdened interstate commerce. West Virginia had attempted "to regulate the interstate [gas] business to the advantage of the local consumers. But this she may not do." *Id.* at 597-598. Taken together, the *West* and *Pennsylvania* cases firmly establish that "the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for that State's residents." *Hicklin v. Orbeck*, 437 U.S. 518, 532-33 (1978).

Recent decisions of the Court continue the stern opposition to state attempts to hoard natural resources. In *Philadelphia v. New Jersey*, the Court branded an attempt by New Jersey to prohibit the importation of garbage destined for scarce land fill sites as "parochial legislation" of the kind consistently held to be constitutionally invalid. 437 U.S. at 627. Similarly, in *Hughes v. Oklahoma*, the Court struck down a state law barring the export of minnows caught within the state.

Electricity transmitted in interstate commerce is fully subject to the protections of the Commerce Clause. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 86 (1927). The Court ruled in *Attleboro* that state regulation of the interstate sale of electricity at wholesale unduly burdens interstate commerce. Because the interstate wholesale power business is "essentially national in character," the wholesale transaction in question was "not subject to regulation by either of the two States. . . ." *Id.* at 90.

B. *New Hampshire's Hydroelectric Export Statute Violates the Commerce Clause.*

Application of the above fundamental Commerce Clause principles to this case is straightforward. The importance of the free flow of energy supplies to the vitality of the national

economy, and to the New England economy in particular, is beyond question. A key form of energy — electricity — is produced and transmitted throughout the New England region without regard to state boundaries to meet the region's needs as economically as possible. As the record shows (see pp. 5-6, *supra*) and as the court below readily acknowledged (J.S. App. 11a), power from NEP's Connecticut River hydroelectric plants "is presently mixed in the grid" and flows freely throughout the six-state region. Under *Attleboro*, the transmission and sale at wholesale of that power is in interstate commerce and beyond the power of New Hampshire or any other state to regulate.

The New Hampshire statute as applied by the PUC flatly prohibits the sharing of the significant hydroelectric energy resources between consumers of electricity in New Hampshire and consumers in its neighboring states. In fact, the express purpose of the PUC order (J.S. App. 35a), specifically affirmed by the court below (J.S. App. 14a), is to secure the economic benefits of cheap hydroelectric power exclusively for New Hampshire citizens at the expense of their neighbors. That the PUC order does not purport physically to alter the dispatch of NEP's plant or the actual flow of power in the regional grid is immaterial. The order directly burdens interstate commerce by attempting to control the economic disposition of that power through its command that NEP sell the power only within New Hampshire (J.S. App. 40a).

New Hampshire's action runs directly counter to this Court's holdings in *West, Pennsylvania v. West Virginia* and *Philadelphia v. New Jersey*. It is a stark example of "simple economic protectionism" subject to the Court's virtual "per se rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. at 624.[3]

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[3] New Hampshire's action contrasts sharply with Montana's coal severance tax, recently upheld in *Commonwealth Edison Co. v. Montana*, 49 U.S.L.W. 4957 (July 2, 1981); in that case the Court was not confronted — as it is here — with discrimination by a state against interstate commerce. *Id.* at 4959.

In striking down New Jersey's ban on the importation of garbage, the Court aptly noted:

> The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

Id. at 629.

In response to an energy crisis facing the Nation, New Hampshire has tried to secure a temporary advantage through economic isolation. "But this she may not do." *Pennsylvania v. West Virginia*, 262 U.S. at 598.

C. *In Enacting the Hydroelectric Export Clause of Section 201(b) of the Federal Power Act, Congress Did Not Affirmatively Authorize New Hampshire To Capture the Economic Benefits of NEP's Hydroelectric Generation.*

The court below conceded that the export statute, standing alone, might violate the Commerce Clause (J.S. App. 10a). The court, however, read the hydroelectric export clause in Section 201(b)[4] of Part II of the Federal Power Act as an affirmative grant of power by Congress to New Hampshire and several other states to regulate the exportation of hydroelectric energy (J.S. App. 7a-8a, 10a-11a). Contrary to this ruling, the clause does not affirmatively grant any authority over interstate commerce. It is a traditional savings clause that preserves certain state restrictions from Part II preemption. Section 201(b), therefore, cannot cure the Commerce Clause infirmities of the New Hampshire statute.

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[4] Section 201(b) provides in pertinent part:

> The provisions of [Part II] . . . shall not . . . deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. . . .

1. An Affirmative Grant of Authority Is Required To Authorize State Action Otherwise Prohibited by the Commerce Clause.

As this Court has noted, Congress may exercise its power over commerce indirectly by affirmatively "conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. at 44. See also *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). Where Congress refers in federal legislation to state authority, the courts must determine whether Congress intended affirmatively to extend new authority to the states not previously enjoyed or whether Congress was simply defining the extent of federal preemption. *BT Investment*, 447 U.S. at 48-49. The delegation of affirmative authority to the states must be explicit, however, since transfers or surrenders of sovereign authority will not be presumed. See *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 547 (1837) (surrender of sovereign power not presumed where "'deliberate purpose of the State to abandon it does not appear'").

The *BT Investment* case closely resembles the instant dispute. At issue there was a state statute prohibiting out-of-state bank holding companies from owning a business within the state that sells investment advisory services. This Court first determined that, unless authorized by federal legislation, the state statute directly and unduly burdened interstate commerce in violation of the Commerce Clause. 447 U.S. at 37-44. The Court then turned to the question whether Congress in Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. § 1846 (1976), had conferred additional authority on the states. In language similar to Section 201(b) of the Federal Power Act, Section 7 provides:

> The enactment by the Congress of [the Bank Holding Company Act of 1956] shall not be construed as prevent-

> ing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

This Court found nothing in this clause or its legislative history indicating a congressional intent to give the states new power to regulate bank holding companies not already possessed. Instead, it found that "Congress' concern was to define the extent of the federal legislation's pre-emptive effect on state law." 447 U.S. at 49.

Congress has commonly included savings clauses in complex federal regulatory legislation when it wishes federal regulation to complement and not completely displace existing state regulation. See, *e.g.*, Section 27 of Part I of the Federal Power Act, 16 U.S.C. § 821 (1976) construed narrowly in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 175-76 (1946). Savings clauses do no more than define the boundary between state and federal authority and do not diminish Congress' exclusive authority to regulate interstate commerce.

This Court has clearly distinguished between such clauses and affirmative grants. It has found an affirmative grant only when a statutory provision contains affirmative, prospective and specific language, particularly when the legislative history of the provision indicates that Congress was aware of the significance of conferring authority upon the states and fully intended to do so. See, *e.g.*, *In re Rahrer*, 140 U.S. 545 (1891) (interpreting the Wilson Act, 27 U.S.C. § 121 (1976)); *James Clark Distilling Co. v. Western Maryland Railway*, 242 U.S. 311 (1917) (interpreting the Webb-Kenyon Act, 27 U.S.C. § 122 (1976)); *Whitfield v. Ohio*, 297 U.S. 431 (1936) (interpreting the Hawes-Cooper Act, 49 U.S.C. § 60 (1976)); *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) (interpreting the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976)). The traditional savings clauses at issue in *BT Investment* and in this case bear no resemblance to

the specific, prospective and affirmative congressional authorizations in those statutes.

2. The Language, Legislative History and Context of the Section 201(b) Hydroelectric Export Clause Establish that the Clause Does Not Affirmatively Grant New Hampshire any Authority to Regulate Interstate Commerce.

The determination whether the Section 201(b) hydroelectric export clause of the Federal Power Act is an affirmative grant of authority to the states or a traditional savings clause defining the scope of preemption is not difficult. The statutory language, legislative history and context firmly establish that it is a savings clause.

On its face, the language of the statute contemplates no authority not previously enjoyed; it is therefore inconsistent with a grant of power to interfere with or burden interstate commerce. Section 201(b) provides in relevant part:

> The provisions of [Part II] . . . shall not . . . deprive a State or State commission of its *lawful authority now exercised* over the exportation of hydroelectric energy which is transmitted across a State line. . . .

(Emphasis added.) Clearly, this language contemplates no authority other than (1) that now exercised and (2) that which is lawful. This language is flatly inconsistent with a grant of authority to regulate commerce because the very purpose of such a grant would be to confer authority (1) which could not then be exercised and (2) which was not then lawful. Thus, the language will not support the meaning that the lower court placed upon it.

The legislative history of the hydroelectric export clause confirms the meaning of its plain language. The original Sen-

ate version of what became Section 201(b) made no reference to state authority over hydroelectric exports. The savings clause was added by the House Commerce Committee. H.R. Rep. No. 1318, 74th Cong. 1st Sess. 18, 27 (1935). Congressman Rogers of New Hampshire explained during the House debates that the savings clause had been added to insulate existing regulation by several states from preemption by Part II. 79 Cong. Rec. 10527 (1935). Congressman Rogers stated:

> [T]he Senate bill as originally drawn would deprive certain states, I think five in all, of certain rights *which they have* over the exportation of hydroelectric energy which is transmitted across the State line. This situation has been taken care of by the House Committee, and I hope when you come to it, section 201 of part II, that you will grant us the privilege *to continue, as we have been for 22 years, to exercise our state right* over the exportation of hydroelectric energy transmitted across State lines but produced up there in the granite hills of old New Hampshire.

Id. (Emphasis added.) Congressman Rogers' fears that the Senate bill would "deprive" the states of *existing rights* over exportation of hydroelectric energy and his plea that New Hampshire be allowed "to continue . . . to exercise" its rights confirm that the House addition was a "savings clause," and not an independent, affirmative grant of power. While the Congressman used the word "grant," he was plainly asking Congress to "grant [to the states] the privilege to continue" to exercise existing, lawful authority, and not to permit the states to exercise *new* authority, not otherwise lawful.

Finally, the statutory context of the hydroelectric export clause confirms that it was intended simply to state the extent of preemption under Part II. Part II was enacted in reaction

to this Court's decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), holding that state regulation of interstate wholesale sales of power impermissibly burdens interstate commerce. Congress could have filled the gap in regulation arising from *Attleboro* by delegating to the states its authority to regulate such sales. Instead, it filled the gap by vesting in FERC comprehensive and exclusive authority to regulate sales for resale. *United States v. Public Utilities Commission*, 345 U.S. 295, 311 (1953) ("*California*"); *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964) ("*City of Colton*"). At the same time, it drew in Section 201, 16 U.S.C. § 824 (1976 & Supp. III 1979), a bright line between federal and state regulatory authority, which in essence followed that established by *Attleboro*: sales for resale would be regulated by FERC, and sales at retail could continue to be regulated by the states. *City of Colton*, 376 U.S. at 214-216.

While Section 201 sets forth Congress' grant of plenary jurisdiction to FERC, Section 201 contains several other clauses stating exceptions to this grant of federal authority, in addition to the hydroelectric export clause in Section 201(b). The Court has held that "'[e]xceptions to the primary grant of jurisdiction in [Section 201] are to be strictly construed.'" *California*, 345 U.S. at 310, quoting *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 690-91 (1947). Two of those exception clauses have been construed, and in both cases the exception has been read narrowly to permit only those exercises of state power permissible under the *Attleboro* line.[5]

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[5] See *California*, 345 U.S. at 311, refusing to construe the Section 201(a), 16 U.S.C. § 824(a) (1976), exception clause extending federal authority "only to those matters which are not subject to regulation by the States" as an affirmative grant of power: "To conceive of [the section] now as . . . an affirmation of state authority over any interstate sales for resale, would be to speculate about a congressional purpose for which there is no support." *Accord, City of Colton*; *Hartford Electric Light Co. v. Federal Power Commis-*

In drawing the *Attleboro* line, Congress intended to subject to uniform federal regulation those aspects of electric transmission and sale held by *Attleboro* to be national in character and as to which disruption by nonuniform state regulation would be harmful. Thus, in *California* the Court held that Section 20 of Part I of the Act, 16 U.S.C. § 813 (1976), did not affirmatively grant authority to the states to regulate the sale for resale of hydroelectric power. Section 20 allowed FERC to regulate such sales only where state regulation was absent or in conflict.[8] The Court rejected the argument that Section 20 affirmatively authorized state regulation when the two specified conditions triggering FERC jurisdiction were not present. Nor did the Court find merit in the contention that unless Section 20 were construed as an affirmative grant, that section would become meaningless due to *Attleboro's* holding that state regulation of sales for resale directly burden commerce. In the Court's view, Congress simply assumed a breadth of state power that *Attleboro* proved wrong. The Court found no evidence that the limitation of FERC jurisdiction under Section 20 was "done with any firm intent to settle with the states a power essentially national." 345 U.S. at 303. Noting that "an

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sion, 131 F.2d 953, 996 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943), narrowly construing the Section 201(b) exception clause following the hydroelectric export clause (FERC shall not have jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter," 16 U.S.C. § 824(b) (Supp. III 1979)).

[8] Section 20, 16 U.S.C. § 813 (1976), provides in relevant part that

> whenever any of the States directly concerned . . . are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor . . ., jurisdiction is conferred upon the commission, upon complaint of any person, aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce . . ..

exception to federal commission authority for power generated at licensed hydroelectric projects" would apply to only 7.8 percent of total national capacity, the Court stated: "It would have been curious for Congress to have approved a very special type of regulatory scheme for such a minimal fraction of the country's total power." *Id.* at 310 n.18.

Thus, to construe the export clause as an affirmative grant would fly in the face of the conclusion in *California* that Congress intended federal authority to be comprehensive with respect to the aspects of transmission and sale of power that are national in character.[7] Such a construction would, moreover, make that clause unique among the limiting clauses in Sections 201(a) and (b), which have been construed as traditional savings clauses rather than as affirmative grants of power. See n.5, *supra*.

A congressional purpose to grant to the states regulatory power over hydroelectric exports would be curious not only because it would breathe life into the very evils put to rest in *Attleboro*, but because the grant would apply only to particular states. The hydroelectric export clause preserves from preemption only lawful authority "*now* exercised" (emphasis added). Since, as Congressman Rogers noted in explaining the purpose of the amendment, only a few states had provisions regulating exports,[8] only those states would be authorized to

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[7] *Accord, City of Colton*, 376 U.S. at 216-220 (holding that "a proper concern for the objective" of maintaining comprehensive federal regulation required that the jurisdictional grant to the FERC in Section 201(b) be read as superceding and repealing by implication a provision parallel to Section 20, Section 6 of the Boulder Canyon Project Act, 43 U.S.C. § 617e (1976)).

[8] Prior to Part II's enactment in 1935, three states in addition to New Hampshire had statutes either regulating or authorizing regulation of the export of hydroelectric energy: Me. Rev. Stat. Ann. tit. 60, § 1 (1916); Me. Rev. Stat. Ann. tit. 68, § 1 (1930); Wis. Stat. § 31.27 (1931); 1929 W. Va. Acts, ch. 58. Maine has since repealed its law. 1955 Me. Acts, ch. 402 at 400. West Virginia's export statute was held unconstitutional on other grounds in 1931. *Hodges v. Public Service Commission*, 110 W. Va. 649, 159 S.E. 834 (1931). The Wisconsin statute is currently codified at Wis. Stat. § 196.375 (1977).

regulate interstate commerce if the hydroelectric export clause were construed as an affirmative grant. Such a construction, however, would make that part of Section 201(b) unique not only among the exceptions clauses in Part II, but in all of the legislation regulating commerce.

When Congress has delegated to the states its power to regulate commerce, it has done so uniformly.[9] See cases cited p. 21, *supra*. Whether or not it raises constitutional questions, the exercise of legislative power to differentiate among states obviously involves delicate and sensitive questions of federal-state relationships. Therefore a purpose to differentiate should not be lightly imputed to Congress. When, as here, the legislative history neither shows that Congress intended to differentiate among the states by conferring new powers on a limited few, nor reveals the reasons that might have prompted Congress to do so, a construction of the statute that would impute such a purpose must be rejected.

Finally, the fact that there is little, if any, state activity restricting exports that is valid under the Commerce Clause does not change what is clearly a savings clause into an affirmative grant of power.[10] There is no evidence that Congress

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[9] Congress itself has exercised federal power in a manner that differentiated among states. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604 (1950); see also Section 209 of the Air Quality Act of 1967, 42 U.S.C. § 7543 (Supp. I 1977), discussed in H.R. Rep. No. 728, 90th Cong., 1st Sess. 21-23. In such cases, however, Congress adopted remedial legislation implementing national policy that could not be achieved without considering regional differences in the basic conditions Congress sought to ameliorate. See, *e.g.*, *Hodel v. Indiana*, 49 U.S.L.W. 4667, 4671 (June 15, 1981). Congress explicitly considered those various conditions and clearly intended to differentiate among the states. In contrast, the hydroelectric export clause of Section 201(b) was neither remedial nor designed to implement the national policy enshrined in Part II; its legislative history indicates no congressional awareness of the different state hydroelectric export laws then in effect, and no congressional intent to differentiate among the states.

[10] We do not contend that all restrictions on hydroelectric *generation* would run afoul of the Commerce Clause. It is well settled that a state may

affirmatively wished to permit states to restrict exports. Congress merely reserved to those states with export restrictions whatever power they had *lawfully exercised*. Congress did not examine what export restrictions, if any, were lawful or sanction any particular restrictions — it simply finessed the issue by preserving "lawful authority," whatever it might be.[11]

As this Court has recognized, Congress frequently leaves to the courts the task of determining which restrictions burden interstate commerce.[12] Congressional adoption of such a

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regulate matters of local concern — *e.g.*, protection of the health and safety of its citizens — even though the regulation may have some impact on interstate commerce. *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186 (1950). When such regulation affects interstate commerce, the Court must balance the competing state and federal claims. *Minnesota v. Clover Leaf Creamery Co.*, 49 U.S.L.W. 4111, 4115-16 (Jan. 21, 1981); *A&P Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976). The Court need not consider whether carefully tailored state regulation of the generation and transmission of hydroelectric energy to conserve scarce water resources or to protect health threatened by the unavailability of electricity would pass the balancing test despite an incidental effect on interstate commerce. In this case the New Hampshire legislation is designed solely to gain an economic advantage for its citizens by discriminating against interstate commerce.

[11] See *Milwaukee v. Illinois*, 49 U.S.L.W. 4445 (April 28, 1981), holding that Subsection 505(e) of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1365(e) (1976), which preserves existing statutory or common law remedies from preemption by Section 505 of the FWPCA, does not signify a congressional determination that such common law remedies existed: "There is nothing unusual about Congress enacting a particular provision, and taking care that this enactment by itself [does] not disturb other remedies, without considering whether the rest of the Act does so or what other remedies may be available." *Id.* at 4452 n.22. (Emphasis added.) Section 505(e) provides in relevant part:

> Nothing *in this section* shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . .

(Emphasis added.)

[12] But in general Congress has left it to the courts to formulate the rules . . . interpreting the commerce clause in its application, doubtless because [Congress] has appreciated the destructive consequences to the commerce of the nation if [the courts'] protection were

practice here, with respect to a matter peripheral to the central purpose of Part II of the Federal Power Act, is not at all strange. Thus, there is no reason to presume that Congress intended to delegate to selected states a power to burden interstate commerce. To the contrary, absent a clear and express manifestation of congressional intent to delegate to the states its power under the Commerce Clause, the established principle of construction is that no such affirmative grant was intended. See, *e.g.*, *City of Colton*, 376 U.S. at 215; *California*, 345 U.S. at 304, 311. *See also Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) at 547.

In short, Section 201(b) does not validate the PUC's action under the New Hampshire statute seeking to capture the economic benefits of NEP's New Hampshire hydroelectric plants for the exclusive enjoyment of New Hampshire citizens. New Hampshire's attempt remains "simple economic protectionism" constituting a *per se* violation of the Commerce Clause. *Philadelphia v. New Jersey*, 437 U.S. at 624.

II. The New Hampshire Statute is Preempted by Part I of the Federal Power Act.

In 1920, Congress enacted Part I of the Federal Power Act to provide for the comprehensive control of the Nation's water resources. A key purpose of the legislation was to assure that the Nation's hydroelectric energy potential was developed for the benefit of interstate commerce. By prohibiting the energy transmitted from NEP's hydroelectric units from benefiting interstate commerce as envisioned by Congress, the New Hampshire statute conflicts with and is preempted by Part I.

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withdrawn . . . and has been aware that in their application state laws will not be invalidated without the support of relevant factual material which will "afford a sure basis" for an informed judgment.

Southern Pacific Co. v. Arizona, 325 U.S. 761, 770 (1945) (citations omitted).

A. *A State Statute is Void under the Supremacy Clause to the Extent It Frustrates the Basic Objectives of a Federal Regulatory Scheme.*

Under the Supremacy Clause, a state statute is void to the extent it conflicts with a federal law. The conflict may be obvious where, for example, "compliance with both federal and state regulations is a physical impossibility . . . ." *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963). Or the conflict may flow from an evident purpose of Congress to displace state law. As this Court noted in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), a preemptive purpose may be found in several ways:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52 [1941]. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute. . . .

See also Maryland v. Louisiana, 49 U.S.L.W. at 4568; *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973).

In determining whether Congress intended to preempt state regulation, the nature of the state's interest must be examined. Where Congress has acted in an area traditionally occupied by the states, no preemption will be found in the absence of a "clear and manifest purpose of Congress" to displace state law.

Rice, 331 U.S. at 230. On the other hand, where Congress acts in an area in which the federal interest is dominant, a preemptive purpose is much more easily found. *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

In short, a state law need not directly conflict with a federal law to be void under the Supremacy Clause. The state law must also fall if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67; *Maryland v. Louisiana*, 49 U.S.L.W. at 4568.

B. *The Central Purpose of Part I Is To Benefit Interstate Commerce to the Fullest Extent Possible through the Development and Use of Hydroelectric Power.*

Part I of the Federal Power Act was enacted in 1920 to provide for "the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest . . . ." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 98 (1965). "The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." *Id.* at 99.

The drafters of Part I intended that such development would promote to the fullest possible extent the generation, sale and transmission of electricity in interstate commerce without regard to state boundaries. In recommending passage of the legislation, the House Committee on Water Power quoted with approval from a report of the Secretary of Agriculture pointing out that "[t]he power requirements of this country will not be met until we develop our water powers, tie them in with steam plants located at the [coal] mine itself and operate all in great interstate systems." H.R. Rep. No. 61, 66th Cong., 1st Sess. 4-5 (1920). Consequently, "[t]he role of . . . [FERC under Part I] in the control and preservation of our national water resources, when their use is

proposed for power purposes, is to ensure the most comprehensive and best use of those resources for the benefit of all of the people of the nation." *Union Electric Co.*, 27 F.P.C. 801, 809 (1962), *rev'd*, 326 F.2d 535 (8th Cir. 1964), *aff'd*, 381 U.S. 90 (1965).

To this end, Congress established in Part I a comprehensive regulatory scheme which conditions the construction and operation of hydroelectric projects on navigable waters upon the issuance of licenses by FERC. Section 4(e), 16 U.S.C. § 797(e) (1976), establishes federal licensing jurisdiction over any person desiring to construct or operate a facility for the development, transmission and utilization of water power on navigable waters. Such licenses are issued on the condition, among others, that the project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce . . . ." Section 10(a), 16 U.S.C. § 803(a) (1976). To determine whether a proposed project constitutes the best comprehensive plan for "interstate commerce" within the meaning of Section 10(a), FERC must consider, as a central part of its analysis, the extent to which the project's hydroelectric generation will "meet the needs of an expanding economy." *Union*, 381 U.S. at 99.

In *Union*, this Court held squarely that the Act "reached beyond the control of navigation," 381 U.S. at 106, and "embodied the full measure of Congress' authority under the Commerce Clause to regulate hydroelectric projects." *Id.* at 107.[13] The Court noted that "the comprehensive development of water power, 'in so far as it was within the reach of the federal

[13] The Court in *Union* upheld the requirement of a license under Section 23(b) of the Act, 16 U.S.C. § 817 (1976), for a hydroelectric project on a non-navigable stream despite the fact that the project had no significant effect on commerce on downstream navigable waters. Section 23(b) requires hydroelectric projects on non-navigable streams to be licensed if their construction or operation will affect interstate commerce.

power to do so,' [*First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 180 (1946)], was the central thrust" of Part I. 381 U.S. at 101. In administering the Act, FERC must consider the impact of proposed hydroelectric projects on "the full spectrum of commerce interests." *Id.*

Part I therefore establishes exclusive and final federal authority for the development of hydroelectric power on waters subject to the Act. State laws which interfere with the development of these projects for the benefit of interstate commerce must fall under the Supremacy Clause. To hold otherwise would grant the states a "veto power [which] easily could destroy the effectiveness of the federal act. . . . [and] would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission . . . ." *First Iowa*, 328 U.S. at 164.

In enacting Part I, Congress did not completely displace state authority, but instead preserved the interests of the states in certain areas "without setting up a divided authority over any one subject." *Id.* at 174. The limited authority left to the states, however, does not encompass the right to restrict the export of hydroelectric benefits.[14] The federal government

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[14] Part I did recognize some state authority over hydroelectric rates. Section 19, 16 U.S.C. § 812 (1976), permits state regulation of hydroelectric rates and services which are wholly *intra*state. Such rates and services are not involved in this case. Section 20, 16 U.S.C. § 813 (1976), arguably appears to permit state regulation of interstate rates and services in those instances in which all states directly concerned regulate such sales and are able to agree, but as discussed above, this Court has held that Section 20, enacted in 1920, was nullified by the *Attleboro* decision seven years later. This limitation on state power was statutorily confirmed by the subsequent enactment in 1935 of Part II of the Federal Power Act. *California*, 345 U.S. at 302-310. Thus, Section 20 may be constitutionally construed only to permit state regulation of rates and services which are intrastate or retail. See *supra*, pp. 25-26.

Two other provisions of Part I refer explicitly to state authority. Section 9(b), 16 U.S.C. § 802(b) (1976), requires that each applicant for a license

has, since its inception, had a dominant interest in the Nation's waterways and the promotion of interstate commerce. In view of this dominant federal interest in the subject matter covered by Part I, state statutes restricting the free flow of hydroelectric energy benefits or impeding the maximum development of hydroelectric energy cannot stand. See *Hines v. Davidowitz*, 312 U.S. at 67-68.

C. *The New Hampshire Statute Frustrates the Central Purpose of Part I.*

NEP's hydroelectric projects are licensed by FERC under Part I on the assumption that their electric generation will benefit interstate commerce, to the "full measure of Congress' authority under the Commerce Clause . . . ." *Union*, 381 U.S. at 107. FERC secured jurisdiction over the Connecticut River in 1941, after finding that it was navigable and that hydroelectric power generated therefrom would "[affect] interstate commerce through the transmission of electric energy." *Bellows Falls Hydro-Electric Corp.*, 2 F.P.C. 380,

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submit evidence of compliance with "the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license." This provision is designed to provide FERC with adequate information as to pending applications for licenses. "Its reference to state laws is by way of suggestion to the [FERC] of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress." *First Iowa*, 328 U.S. at 177-178. Section 9(b) does not require compliance with any state laws. *Id.* at 177.

Finally, Section 27, 16 U.S.C. § 821 (1976), expressly saves from federal preemption certain state laws relating to property rights, but it is narrowly limited to property rights for the control, appropriation, use or distribution of water for irrigation or for municipal or other uses of the same nature. *First Iowa*, 328 U.S. at 175-176. Section 27 does not save state laws which purport to regulate the exportation of energy produced at licensed hydroelectric projects.

384 (1941). Since then, each of the hydroelectric stations involved in this case has been and is now licensed under Part I of the Federal Power Act.

The New Hampshire statute as applied by the PUC prohibits NEP from selling the output of its licensed hydroelectric units in New Hampshire to customers outside of the state. The consequence of the PUC decision is to force NEP to assign the economic benefits of the hydroelectric power to other utilities in New Hampshire. To replace these benefits, NEP will be forced to assign the economic costs of more expensive generation to its customers in Rhode Island and Massachusetts.

The PUC's order conflicts with licensure under Part I since it prevents NEP's New Hampshire hydroelectric generation from continuing to benefit interstate commerce to the fullest extent. The necessity for the free flow of such benefits among customers in the three states, without regard to state boundaries, arises from Congress' desire in Part I to make use of the Nation's water power potential to benefit interstate commerce. Thus, the PUC's order defeats the basic premise of the licenses under which NEP's hydroelectric units operate.

The PUC's order also obstructs full attainment of the ends of Part I since it inhibits future development of New Hampshire's hydroelectric potential to further benefit interstate commerce. Neither NEP nor any other company will have any incentive to build new hydroelectric projects in New Hampshire or (in NEP's case) to augment existing projects in order to benefit customers outside New Hampshire. In many cases, such new projects might be built, or existing ones augmented, when the cost of alternative sources of generation rises to a level that makes such additions to capacity feasible. Given the PUC's order, however, few utilities serving customers outside New Hampshire would be able to invest in new hydroelectric capacity in New Hampshire.

The disincentive to the construction of new hydroelectric stations and to the expansion of existing hydroelectric stations

arising from the PUC's action could therefore limit the amount of hydroelectric power produced and inhibit attainment of Part I's goal of encouraging the maximum development of hydroelectric power.

The statute as applied therefore frustrates the central purpose of Part I that hydroelectric power on the Nation's waterways shall be developed for national, rather than local or parochial advantage, and shall be developed to the fullest possible extent to benefit interstate commerce so as to meet the needs of an expanding economy. Since the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. at 67, it is void as applied under the Supremacy Clause.

D. *The Hydroelectric Export Clause of Section 201(b) of Part II Does Not Save the New Hampshire Statute from Part I Preemption.*

The Section 201(b) hydroelectric export clause on its face applies only to Part II of the Federal Power Act. It does not mention Part I and therefore cannot insulate the New Hampshire statute from Part I preemption.

The question arises, however: If Part I, enacted in 1920, preempts operation of the New Hampshire and similar hydroelectric export statutes, what state authority, if any, did Congress save when it enacted Section 201(b) in 1935? The answer lies in a review of the scope of Part I, at least as Congress would have viewed it in 1935, since Part I only preempts application of hydroelectric export statutes to projects licensed under that part of the Federal Power Act.

As originally enacted in 1920, Part I left unregulated the construction and operation of hydroelectric projects on nonnavigable waters. Even if such a project affected interstate commerce within the meaning of Section 23(b) of Part I, prior to 1935 a company could construct or operate it without ever being required to secure a federal license, as long as the river

did not turn out to be navigable. *Union*, 381 U.S. at 109; *Farmington River Power Co. v. Federal Power Commission*, 455 F.2d 86, 89 (2d Cir. 1972); *Puget Sound Power & Light Co. v. Federal Power Commission*, 557 F.2d 1311, 1313-14 (9th Cir. 1977). This limitation on federal jurisdiction was removed by the 1935 amendment to Section 23(b), which made licensure mandatory whenever the proposed project was found to have affected the interests of interstate or foreign commerce. The amendment was not intended to be retroactive, however. *Farmington River Power Co.*, 455 F.2d at 90.

There were many substantial hydroelectric projects in 1935 already constructed on rivers FERC had not determined to be navigable and which remained free of federal licensing requirements. In fact, no determination had been made at that time that the Connecticut River was navigable and none of NEP's projects was then licensed under Part I. And in view of the Court's ruling that navigability be determined on the basis of each river's own unique history and facts, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 404 (1941), the issue was far from clear. NEP actively contested that the Connecticut River was navigable and it was not until 1941 that the matter was resolved. *Bellows Falls Hydro-Electric Corp.*, 2 F.P.C., 380, 384.[15]

In short, Congress in 1935 would have seen no Part I barrier to the application of state export statutes to many hydroelectric projects simply because the projects were not subject to Part I at the time. In enacting Section 201(b), Congress could well have assumed that New Hampshire and other states then may have had some "lawful authority" over hydroelectric exports from such projects. Of course, the applicability of such

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[15] NEP's Bellows Falls project is not subject to the New Hampshire statute since it lies on the Vermont side of the Connecticut River (J.A. 9a, 22a).

statutes diminished significantly subsequent to 1935 as more rivers were determined to be navigable.[16]

III. The New Hampshire Statute as Applied by the PUC Is Preempted by Part II of the Federal Power Act.

In addition to being barred by the Commerce Clause and preempted by Part I, the PUC's action under the New Hampshire statute is also preempted by Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979). The court below recognized that the PUC's order requires NEP to rearrange its existing wholesale rates and contracts on file with FERC (J.S. App. 14a). Yet, Part II of the Federal Power Act grants FERC comprehensive and exclusive jurisdiction over the interstate transmission and sale of electricity at wholesale, *City of Colton*, 376 U.S. at 215, *California*, 345 U.S. at 311, including transmission and sales from hydroelectric projects licensed under Part I. *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414, 418-19 (1952); *California*, 345 U.S. at 308. While the Section 201(b) hydroelectric export clause saves lawful, preexisting state restrictions on hydroelectric energy exports from Part II preemption, it neither recognizes any state authority over interstate wholesale rates, nor saves any new restrictions on hydroelectric projects imposed after the Act's passage. The PUC's action therefore must give way to superior federal authority under Part II.

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[16] Maine repealed its hydroelectric export statute, known as the Fernald law, Me. Rev. Stat. Ann. tit. 68, § 1 (1930), repealed, 1955 Me. Laws, ch. 402 at 400, when it became apparent that FERC could assert Part I authority over most hydroelectric projects on Maine Rivers. *See* Maine Legislative Record, House, May 17, 1955 at 2302 (statement by Rep. Bernier). For a comprehensive history of the Fernald law, enacted three years prior to, and probably the model for, the New Hampshire statute, see L. Smith, *The Power Policy of Maine*, 80-152 (1951).

A. *In Enacting Part II of the Federal Power Act, Congress Gave FERC Pervasive and Exclusive Regulatory Authority over Interstate Wholesale Sales of Electricity.*

As we discussed earlier, Part II was passed in response to this Court's decision in *Attleboro* that states have no authority to regulate wholesale sales of electricity transmitted in interstate commerce. "Part II is a direct result of *Attleboro*. . . . The latter left no power in the states to regulate licensees' sales for resale in interstate commerce, while the former established federal jurisdiction over such sales." *California*, 345 U.S. at 311. Congress gave that authority to FERC in Part II by declaring that federal regulation of such sales is in the public interest, Section 201(a), 16 U.S.C. § 824(a) (1976), and by allowing federal jurisdiction to follow the physical flow of such energy across state lines. Section 201(b), 16 U.S.C. § 824(b) (Supp. III 1979).

The broad reach of FERC's jurisdiction under Part II over interstate wholesale transactions is definitively illustrated by several decisions of this Court. In two early cases, this Court noted Congress' desire to fill the *Attleboro* gap without depriving the states of existing regulatory authority, but pointed out that Congress had defined the Commission's jurisdiction with technical precision. The grant of federal power was

> couched largely in the technical language of the electric art. Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental test.

Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515, 529 (1945). See also *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U.S. 61, 67-68, 70-71 (1943).

This Court again considered the scope of federal power over wholesale transactions in *City of Colton*. There, FERC had

asserted jurisdiction over the sale of electricity at wholesale by Southern California Edison Company to the City of Colton which in turn distributed the electricity at retail within the city. Although Edison operated solely within California and the City of Colton is located in California, Edison received some energy from Nevada and Arizona, and some of this interstate energy was found by FERC to be included in Edison's sale to the City of Colton. The court of appeals rejected FERC's assertion of jurisdiction, relying on the limitation contained in Section 201(a) of Part II, stating that federal regulation was "to extend only to those matters which are not subject to regulation by the States." This Court reversed the court of appeals' decision and upheld FERC. The Court held that the clear grant of power to the Commission under Section 201(b) of the Act over "interstate sales of [energy] at wholesale" could not be nullified by the very general policy declaration in Section 201(a). 376 U.S. at 215.

A similarly sweeping assertion of FERC jurisdiction was upheld by the Court in *Federal Power Commission v. Florida Power & Light Co.*, 404 U.S. 453 (1972). In that case, FERC claimed jurisdiction over a utility operating in southern Florida on the basis that some out-of-state energy on occasion reached the utility's facilities. The Court upheld FERC's action, noting that FERC jurisdiction attached no matter how small the quantity of interstate energy reaching the utility. *Id.* at 461 n.10.

The clear consequence of the above holdings is that all wholesale sales of any utility interconnected with an interstate transmission network are subject to FERC regulation under Part II. Of principal concern to this appeal is FERC's exclusive jurisdiction over wholesale rates.

The ratemaking provisions of Part II are contained in Sections 205 and 206, 16 U.S.C. §§ 824d, 824e (1976 & Supp. III 1979). Section 205(a) sets forth the basic standard that all "rates and charges . . . for or in connection with the transmis-

sion or sale of electric energy" are subject to FERC's jurisdiction and "all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable." Any other rate or charge is unlawful.

Section 205(b) is directly pertinent here since it prohibits discrimination among a utility's wholesale customers. No utility may, with respect to a wholesale sale,

> (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either *as between localities* or as between classes of service.

(Emphasis added.) Section 205(c) obligates utilities to file with FERC all rates subject to FERC's jurisdiction, including all contracts which affect such rates. Under Section 205(d), no rate can be changed except upon 60 days' notice. 16 U.S.C. § 824d(d) (Supp. III 1979). Section 205(e) authorizes FERC to investigate new rate filings. FERC may suspend new rates for up to five months, at which point the rates take effect subject to refund upon completion of FERC's investigation. Section 206(a) of the Act gives FERC broad investigatory powers over existing rates; in the event FERC finds a rate to be unlawful, it can determine the appropriate rate to be charged thereafter.

FERC's jurisdiction over wholesale rates under Sections 205 and 206 is plainly comprehensive. And fundamental to the statutory scheme is the principle that no wholesale rate, other than the rate on file with FERC and in effect, may be charged by an electric utility. Neither a court nor a state regulatory commission has authority to establish a different rate. *Arkansas Louisiana Gas Co. v. Hall*, 49 U.S.L.W. 4947 (July 2, 1981); *Montana-Dakota Utilities Co. v. Northwestern Public Service Commission*, 341 U.S. 246, 251 (1951).

Congress in Part II also directed FERC to encourage power pooling and gave it authority, subject to certain limitations, to order interconnections and exchanges of power between utilities. Section 202, 16 U.S.C. § 824a (1976 & Supp. III 1979). This authority was expanded in 1978 and FERC was also empowered to order one utility to provide transmission services for another. Federal Power Act, Sections 210-212, as amended by Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 824i, 824j, 824k (Supp. III 1979). At the same time Congress authorized FERC to exempt electric utilities from state laws prohibiting or preventing voluntary pooling arrangements. Federal Power Act, as amended by PURPA, 16 U.S.C. § 824a-1 (Supp. III 1979). Only state laws designed to protect the environment, conserve energy or mitigate fuel shortages are exempted. *Id.*

Thus, in addition to its authority over wholesale rates, FERC is directed to encourage power pooling and is authorized under certain conditions to order utilities to sell or exchange electric power at wholesale, notwithstanding state laws to the contrary. These powers confirm that wholesale bulk power supply arrangements in interstate commerce are subject to FERC's exclusive jurisdiction.

B. *The PUC's Order Applying the New Hampshire Statute Invades FERC's Exclusive Domain over Interstate Wholesale Rates.*

Part II applies with full force to NEP's business, which consists almost entirely of the interstate sale of electricity at wholesale. As noted at the outset (pp. 4-6, *supra*), all of NEP's units, including its New Hampshire hydroelectric plants, are connected to the regional, interstate transmission grid and are operated under NEPOOL dispatch. Electric energy produced at NEP's generating units flows freely throughout the regional transmission network. Since this energy is therefore in

interstate commerce within the meaning of Part II's jurisdictional provisions, all of NEP's wholesale sales are subject to FERC's rate jurisdiction. See *Federal Power Commission v. Florida Power & Light Co.*; *City of Colton*.

By directing NEP to sell its hydroelectric energy to New Hampshire customers, the PUC's order directly interferes with FERC's regulation of wholesale rates. The PUC's order will require NEP substantially to alter its current wholesale rates and contracts which are on file with FERC and are subject to the full reach of FERC's ratemaking authority under Sections 205 and 206 of Part II. To comply with the order, NEP must decrease the rates it charges its existing New Hampshire wholesale customers and enter into new wholesale transactions with other New Hampshire utilities. Because the economic benefits of the New Hampshire hydroelectric units would no longer be available to NEP's Massachusetts or Rhode Island customers, NEP's wholesale tariffs for those customers would also have to be changed to reflect an increase in rates.

The new "arrangements," whatever their form, would be contracts or rates for wholesale electric service in interstate commerce. As long as New Hampshire's transmission network remains interconnected with transmission lines in the rest of New England, NEP's wholesale rates to and contracts with New Hampshire utilities are subject to exclusive federal jurisdiction. *Florida Power & Light*; *City of Colton*. Since Section 205(b) of Part II, 16 U.S.C. § 824d(b) (1976), prohibits discrimination in rates "as between localities," it is doubtful that FERC would approve any filing package that secured the economic benefits of hydroelectric power for a class of wholesale customers in one locality (New Hampshire) to the detriment of wholesale customers in other localities (Massachusetts and Rhode Island).[17]

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[17] NEP could not avoid this charge simply by selling New Hampshire utilities the output of the Connecticut River units through "unit" contracts

Established FERC policy prohibits the assignment of particular generating units to particular customers. FERC has consistently required utilities to sell the output from all generating units to all customers on the basis of average cost. See *Nevada Power Company*, 10 FPS 5-211, 5-215 to 16 *rehearing denied*, 10 FPS 5-568 (1976), *aff'd*, 589 F.2d 1002 (9th Cir. 1979), holding that the costs of Hoover Dam hydroelectric power allotted to the State of Nevada must be "rolled-in," that is, averaged, by a Nevada utility with all power costs so as to reduce rates to its California customers. By assigning the lower costs of NEP's hydroelectric generation exclusively to customers in New Hampshire, the PUC's order directly violates this federal policy. Such interference with FERC's authority to determine the allocation of generating costs among wholesale customers is indistinguishable from Louisiana's attempt to allocate the costs of its first use tax between gas producers and gas pipelines, held preempted by FERC's similar authority under the Natural Gas Act[18] in *Maryland v. Louisiana*, 49 U.S.L.W. at 4568-4569.

While the PUC avoided the question of the need for FERC approval of these changes, the court below recognized that "new rates, contract modifications or accounting adjustments . . . may naturally flow from the export termination," and ordered NEP to "make appropriate adjustments and filings with the appropriate federal and State administrative agencies" (J.S. App. 14a). Exactly what will happen if FERC dis-

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(*i.e.*, contracts covering the output of one or more units). Unit contracts are entered into to benefit existing customers generally by allowing other utilities to pay the costs of carrying excess generating capacity. They are not consummated to injure existing customers by depriving them of the benefits of the most economic units available; to the extent that such contracts were entered into, they would be subject to challenge under Section 205(b).

[18] 15 U.S.C. §§ 717-717w (1976), as amended by the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 and 42 U.S.C. § 7255 (Supp. III 1979).

approves the filings, the court does not say. Conceivably, NEP could be whipsawed by the conflicting demands of different sovereigns, *i.e.*, it could be ordered by FERC not to favor New Hampshire customers and by the PUC to do just that. The possibility of such interjurisdictional squabbling between federal and state agencies, with utilities caught in the middle, is totally at odds with the fundamental purpose of Part II — to give FERC complete and unified jurisdiction over interstate sales of electricity at wholesale. See *supra*, pp.23-26.

C. *The Section 201(b) Hydroelectric Export Clause Does Not Protect the PUC's Application of the New Hampshire Statute from Part II Preemption.*

In the absence of the Section 201(b) declaration that nothing in Part II shall "deprive" a state of its "lawful authority now exercised" over hydroelectric energy exports, there could be little question but that the PUC's application of the New Hampshire statute is preempted by Part II. The remaining question is whether the Section 201(b) hydroelectric export clause was intended to reach the type of regulatory action undertaken by New Hampshire in this case. We submit it was not, for two reasons: (1) the clause does not "save" any state authority to regulate rates in wholesale sales of electricity; and (2) the clause does not save any state export restrictions imposed for the first time after the enactment of Section 201(b) in 1935.

Section 201(b) on its face refers to authority over the "exportation" of hydroelectric energy "transmitted" across state lines. These are physical terms. At most, the hydroelectric export clause preserves lawful state restrictions on the physical exportation of power; no state authority is recognized over the wholesale contracts and tariffs that govern the allocation of the economic benefits of the power.

This Court expressly recognized this distinction in *California*. That case involved an unsuccessful challenge to federal jurisdiction under Part II of the Federal Power Act over hydroelectric projects licensed under Part I. The Court rejected the argument that Section 201(a) of Part II preserved state jurisdiction over wholesale rates under Section 20 of Part I. See *supra*, p. 25. It also viewed the hydroelectric export clause "in apparently similar vein," noting that it

> certainly does not go beyond that of § 201(a) . . . in limiting federal authority. This is true, not only because of the substantial similarity of the language, but also because it *appears not to have been drafted with state rate regulation in mind*. Rather, 79 Cong. Rec. 10527 [Statement of Congressman Rogers] indicates that the provision was intended to preserve the validity of certain state statutes prohibiting or regulating the *volume* of state power exported. Compare S 2796, 74th Cong, 1st Sess, as introduced, § 201 (b), and *idem*. as reported in the House, Union Calendar No. 451, § 201 (b). It has been so construed. *Safe Harbor Water Power Corp.*, 5 F.P.C. 221, 235.

345 U.S. at 300-301 n.4 (emphasis added.)

The PUC did not purport to regulate the "volume" of power generated at NEP's hydroelectric units and transmitted across state lines. In fact, its order does not require any change in the way the units are dispatched or the power is transmitted. As we have noted, the PUC's directive that NEP sell the power within New Hampshire requires a restructuring of NEP's existing wholesale tariffs and contracts based upon a reallocation of the costs of electric generation. The PUC's action thus constitutes "state rate regulation" pure and simple — a matter not covered by Section 201(b).[19]

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[19] Arguably, even volumetric restrictions on hydroelectric exports would have an impact on a utility's wholesale tariffs in that the restricted

In enacting Section 201(b), Congress preserved whatever "lawful authority" certain states then possessed over hydroelectric energy exports. Congress did not "preserve" for the states what it clearly understood to be unconstitutional under *Attleboro* — state authority over interstate wholesale rates. Section 201(b) therefore does not save the PUC's action from preemption by Part II.

The Section 201(b) hydroelectric export clause cannot save the PUC's action from Part II preemption for an additional and independent reason. The plain language of Section 201(b) limits its savings effect to "lawful authority *now exercised*." (Emphasis added.) This language saves from preemption only those export restrictions imposed prior to the Act's passage. Congress' evident concern was to prevent disruption of economic relationships developed as a result of lawful export restrictions already in effect on hydroelectric stations existing at the time of the Act's passage. Certainly nothing in the language or legislative history suggests an intent to permit the few states that had imposed such restrictions or whose legislatures had authorized their imposition to act *prospectively* to disrupt existing *interstate* economic arrangements. Yet, such disruption could well result if the provision is stretched from a grandfather clause saving only existing export restrictions to one contemplating the prospective imposition of export restrictions.[20] Properly construed, the Section 201(b)

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energy would not be available for transmission in interstate commerce. That kind of impact on rates would be incidental and secondary, however, and therefore would not constitute prohibited wholesale ratemaking. Here the interference with wholesale rates arising from the PUC's order is direct and deliberate.

[20] Even if the hydroelectric export clause were construed to permit a restriction on hydroelectric exports by reallocating the costs of generation among wholesale customers, the effect of any such restriction applied to NEP's New Hampshire hydroelectric stations in 1980 is to upset economic relationships developed over many years. NEP's hydroelectric stations sub-

hydroelectric export clause does not save from Part II preemption the PUC's restrictions imposed in 1980, forty-five years after the Act's passage in 1935.

Conclusion.

The decision below should be reversed.

Respectfully submitted,

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ject to the PUC order were constructed from 1930 to 1956 (J.A. 20a). Over the years, NEP's customers in Massachusetts, Rhode Island, and New Hampshire have largely paid for the investment in these plants through depreciation charges included in rates. Therefore, in addition to the lower cost of hydroelectric energy, all of NEP's customers now enjoy lower fixed costs arising from such depreciation. Now, after all of NEP's customers have substantially paid for these projects, New Hampshire for the first time has tried to capture their benefits exclusively by expropriating an economic advantage attributable to many years of investment by *all* of NEP's customers.

Appendix.

The pertinent provisions of Part I of the Federal Power Act, 16 U.S.C. §§ 792-823 (1976), are as follows:

SECTION 4, 16 U.S.C. § 797

The Commission is hereby authorized and empowered —

* * *

(e) . . . . To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided* further,

That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided* further, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

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SECTION 10, 16 U.S.C. § 803

All licenses issued under this [Part I] shall be on the following conditions:

(a) . . . . That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for

other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

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SECTION 20, 16 U.S.C. § 813

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. . . [W]henever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties, or such States are unable to agree through their properly constituted authorities on the services to be rendered, or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is conferred upon the commission, upon complaint of any person, aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

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SECTION 23(b), 16 U.S.C. § 817

* * *

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works, across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

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The pertinent provisions of Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k (1976 & Supp. III 1979), are as follows:

SECTION 201, 16 U.S.C. § 824

(a) . . . . It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this [Part II and Part III] and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) . . . . (1) The provisions of this [Part II] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this [Part II and Part III], over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

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(c) . . . . For the purpose of this [Part II], electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) . . . . The term "sale of electric energy at wholesale" when used in this [Part II], means a sale of electric energy to any person for resale.

(e) . . . . The term "public utility" when used in this [Part II and Part III] means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of [Sections 210, 211 or 212 of this Act]).

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SECTION 205, 16 U.S.C. § 824d

(a) . . . . All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) . . . . No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) . . . . Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may

designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) . . . . Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) . . . . Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full

hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * *

SECTION 206, 16 U.S.C. § 824e

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory

or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

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